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In The
Supreme Court of the United States

JAMES M. DUFF,
WILLIAM E. STRATTON,
AND
TERRENCE DOLAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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In its Brief in Opposition ("Govt. Br."), the government contends that petitioners committed mail fraud because the City did not receive all for which it bargained and, as a result, was deprived of its money or property. In the eyes of the government, and the court of appeals below, although the City received all of the services "for which it had contracted, the City 'completely lost the other type of services for which it was paying ... – services performed by an MBE or an WBE precisely because the company is a qualified MBE or WBE.' Pet. App. B26." (Govt. Br. 5-6.) Rather than demonstrating why review of the judgment below should be declined, this argument highlights the compelling need for that review. The government's argument and the holding of the court of appeals rest on the insupportable proposition that mail fraud is committed even where the City – the putative victim of petitioners' scheme – paid not a penny more than it contracted to pay and where the only "loss" is the frustration of the City's regulatory interests.

The government fails to distinguish this case from this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), and fails to address in any meaningful way the conflict among the Circuits on the issue of whether the "right to control spending" constitutes "money or property" under the federal mail fraud statute, 18 U.S.C. § 1341. In addition, the Seventh Circuit's decision is in direct conflict with the directives of the Sentencing Guidelines regarding what

constitutes "loss" under the fraud Guidelines. For all of these reasons, the decision of the Seventh Circuit should be reviewed by this Court.

Arguing that petitioners' scheme simply was intended to obtain the City's money through deception, the government suggests in its Brief in Opposition that this is just another run-of-the-mill mail-fraud case, not deserving of review by this Court. On the contrary, and as acknowledged by the government, the record below conclusively demonstrates that WCM and REM provided all of the services which they contracted to perform and that neither the City nor Waste Management paid (or could have paid) more for those services as a result of petitioners' scheme. While WCM received City funds, this resulted in no pecuniary loss to the City because it received the janitorial services for which it had contracted and paid. Moreover, the City paid nothing at all to REM in connection with the City's four waste-recycling contracts with Waste Management. The terms and structure of those contracts, which were fixed years before REM even became Waste Management's sub-contractor, provided for payment by the City to Waste Management based upon fixed unit prices which were unaffected by the REM sub-contract. (Pet. 3.) Therefore, any payments made by the City could not possibly have been affected by any deception in which petitioners engaged in connection with REM's MBE certification. The City neither suffered nor could suffer any

pecuniary injury resulting from petitioners' conduct. The City paid Waste Management not a penny more than it originally contracted to pay, nor did WCM receive more than the amounts prescribed by its contracts with the City.[1]

While the government, like the Seventh Circuit below, acknowledges that petitioners "performed the relevant services as specified in the contracts," it argues nevertheless that the City did not receive all of the services for which it contracted because its expenditures did not "achieve the full range of its contracting objectives." (Govt. Br. 8, 9 fn. 4.) The government asserts that "the City did not in fact receive the benefit of its bargain because petitioners' misrepresentations frustrated the achievement of one of the City's purposes in spending the money – i.e., to foster the development of minority- and women- owned businesses." (Govt. Br. 8.) That the City may not have achieved "one of the City's purposes in spending the money" is not the same as failing to receive the services for which it contracted at the prices it contracted to pay. The government's argument

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[1]While the government repeatedly refers to the "premiums" that the City was willing to pay to promote the development of MBEs and WBEs (Govt. Br. 6, 8-9, 10, 11, 13), there is no support in the record below for this proposition aside from the lone passing remark at oral argument by the government's counsel. Apx. B-27-B-28.

simply treats the identity of the contractor – the party providing the services – as part of the "services" for which the City contracted, which it obviously is not. The City was not deprived of property, nor was it petitioners' intention to do so. All that the City lost was the advancement of its regulatory objective – fostering "the development of minority- and women-owned businesses." (Govt. Br. 8.) Loss of that objective, involving what some of the cases refer to as the "right to control spending," is not a loss of money or property, and a scheme which seeks merely to deprive another of that objective does not, therefore, involve the intended deprivation of money or property required for a Section 1341 conviction under *McNally*.

The circuits are divided on this issue; the Seventh and Eight Circuits recognize the right to control spending as a property interest under Section 1341, while the Second, Third and Ninth Circuits do not. (Pet. 12.) Instead of addressing this genuine conflict among the circuits, the government attempts to distinguish certain of the cases cited by petitioners on the basis that none of those cases "involved fraud directed at an MBE, WBE, or similar program, and none involved a scheme whose purpose and effect was to divert the victim's funds to expenditures that did not fully accomplish the objectives of

the relevant spending program." (Govt. Br. 9.)[2] Such claimed "distinctions" of the cases cannot obscure the genuine conflict among the circuits on the central issue presented by this case. Whether a governmental entity's "right to control its spending" is a property interest under Section 1341 as construed by *McNally*, is a fundamental issue on which the circuits disagree. This is an important issue of federal criminal law involving a statute widely used by federal prosecutors, with wide-ranging implications. This Court should resolve that conflict.

Finally, the government contends that simply because petitioners' scheme resulted in contracts being awarded to companies that were not properly qualified as W/MBE's - and even though all the work was performed, in exemplary fashion, and at the lowest available price – there was still a pecuniary "loss" to the City under the fraud Guidelines. This

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[2] As did the Seventh Circuit below, the government fails even to mention the opinion of the Eighth Circuit in *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), which was the cornerstone of the government's successful response to petitioners' motion to dismiss from the indictment the mail-fraud counts. The government also fails to address *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), which held that the frustration of a right to control spending is not a violation of Section 1341, even where the victims made payments to the defendants as a result of the scheme.

cannot be so. The Guidelines are unambiguous that in order to have a "loss" under the fraud Guidelines, there must be "pecuniary harm" to the victim (here the City). The Guidelines further make clear that "'Pecuniary harm' means harm that is *monetary*." (U.S.S.G. §2B1.1, App.n 3 (Nov. 2006 ed.) (emphasis added). Here, there was absolutely no pecuniary harm to the City, as it received all of the services for which it contracted at the lowest possible cost, pursuant to competitive bidding, and all those services were, by all accounts, well-performed. Again, while the City may have been deprived of its "regulatory" or "legislative" interest in fostering W/MBE's, it clearly did not suffer any "pecuniary harm."

The government next argues that *certiorari* is not warranted because "to the extent that the applicability of the relevant Guideline to cases like this one requires clarification, the Sentencing Commission rather than this Court is the body primarily entrusted with that task." (Govt. Br. 13.) This, too, misses the mark. Petitioners do not claim that "clarification" is needed; rather petitioners seek this Court's review because the Seventh Circuit's holding is in direct contravention of the clear directive of the Guidelines as discussed above and in the Petition.

CONCLUSION

For the reasons stated above, as well as in their original Petition, a writ of *certiorari* should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully Submitted,
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